

**MEDICAL BOARD OF CALIFORNIA  
DEPARTMENT OF CONSUMER AFFAIRS**

**INITIAL STATEMENT OF REASONS**

**Hearing Date:** Friday, May 9, 2003

**Subject Matter of Proposed Regulations:** Disciplinary Guidelines

**Section(s) Affected:** Title 16, California Code of Regulations section 1361

Specific Purpose of each adoption, amendment, or repeal:

Senate Bill 523 (Stats. 1995, Chapter 938; Kopp) provides that a penalty in any administrative disciplinary action may not be based on a guideline unless it has been adopted as a regulation in accordance with the Administrative Procedure Act.

In 1999, the board adopted regulations that incorporated by reference disciplinary guidelines entitled, "Manual of Disciplinary Guidelines and Disciplinary Order" (8<sup>th</sup> Edition, 1999).

Since the adoption of the regulations, the board has considered revisions to the guidelines to incorporate additional violations and modification of the penalties to be consistent and appropriate to the practice of physicians and surgeons.

The board is now seeking to amend the disciplinary guidelines to keep current and useful.

Factual Basis

The board's mandate is to protect the health, safety, and welfare of California consumers. The board's highest priority is to protect consumers by utilizing its authority to investigate complaints and take appropriate disciplinary action against licensees and applicants for licensure who endanger the health and safety of consumers.

The board's disciplinary guidelines are intended to assist administrative law judges, deputy attorneys general, board members, and staff in selecting the most appropriate penalty for a licensee who has violated the laws and regulations governing the practice of physicians and surgeons.

Title 16, CCR 1361, incorporates by reference the board's "Manual of Disciplinary Guidelines and Disciplinary Order (8<sup>th</sup> Edition, 1999)" for licensees who are disciplined and placed on probation. In February 2002, the board's Enforcement Program staff created a Disciplinary Guidelines Task Force and invited representatives from the Office of the Attorney General to participate. The Task Force looked at every term and condition in the Disciplinary Guidelines to ensure the language was clear and easy to enforce. The Task Force also identified areas where probation investigators had difficulty monitoring respondents, and proposed new language to enhance public protection for healthcare consumers. Task Force members had numerous discussions with representatives of the California Medical Association and Center for Public Interest Law, and made several changes to the original draft. Representatives of the Task Force, California Medical Association, and Center for Public Interest Law agreed to all the terms and conditions in the final draft presented to the board. On January 31, 2003, the board approved the proposed revisions to the Disciplinary Guidelines. The revised document

entitled, "Manual of Model Disciplinary Orders and Disciplinary Guidelines" (9<sup>th</sup> Edition, 2003) is hereby incorporated by reference.

### Summary of Changes:

Model Condition Number:

1. **Revocation - Single Cause.** *No change.*
2. **Revocation - Multiple Causes.** *No change.*
3. **Suspension – Single Cause.** *This section has been eliminated. Reference Model Condition Number # 74- Actual Suspension.*
4. **Suspension – Multiple Causes (run concurrently).** *This section has been eliminated. Reference Model Condition Number # 74- Actual Suspension.*
5. **Suspension – Multiple Causes (run consecutively).** *This section has been eliminated. Reference Model Condition Number # 74- Actual Suspension.*
63. **Standard Stay Order.** *The suspension option was deleted and language requiring respondent to provide proof of service was incorporated with Model Condition Number # 28- Notification.*
74. **Actual Suspension.** *No change.*
85. **Controlled Drugs Substances - Total Restriction.** *Changes Controlled Drugs to Controlled Substances. Adds the respondent shall not issue any recommendation or approval which authorizes a patient to possess or cultivate marijuana pursuant to Health and Safety Code section 11362.5.*
96. **Controlled Drugs Substances - Surrender of DEA Permit.** *Changes Controlled Drugs to Controlled Substances. Changes triplicate prescription forms and federal forms to state prescription forms and all controlled substances order forms.*
107. **Controlled Drugs Substances - Partial Restriction.** *Changes Controlled Drugs to Controlled Substances. Adds the respondent shall not issue any recommendation or approval which authorizes a patient to possess or cultivate marijuana pursuant to Health and Safety Code section 11362.5. Deletes optional language which permitted respondent to prescribe, administer, dispense or order controlled substances in a specific Schedule in a specific setting. Adds optional language requiring respondent to surrender respondent's current DEA permit to reapply for a new DEA permit limited to those Schedules authorized by this order; and to submit proof that respondent has surrendered respondent's DEA permit for cancellation and reissuance.*
138. **Controlled Drugs Substances - Maintain Records and Access to Records and Inventories.** *Changes Controlled Drugs to Controlled Substances. Adds that respondent must maintain records of any recommendation or approval which authorizes a patient to possess or cultivate marijuana pursuant to Health and Safety Code section 11362.5; respondent shall keep the records in a separate file or ledger in chronological order; respondent's controlled substances records and inventories shall*

be available during business hours for inspection and copying on the premises. Makes failure to maintain all records, provide immediate access to the inventory or make all records available for immediate inspection and copying on the premises, a violation of probation.

449. **Drugs & Controlled Substances - Abstain From Use.** Changes Controlled Drugs to Controlled Substances. Adds provisions that respondent shall notify the Division of the issuing practitioner's name, address, and telephone number; medication name and strength; and issuing pharmacy name, address, and telephone number for any lawful prescription medications received.
4410. **Alcohol - Abstain From Use.** Adds that respondent shall abstain from the use of products or beverages containing alcohol.
4511. **Biological Fluid Testing.** Adds provisions that a certified copy of a laboratory test result may be received in evidence in any proceedings; and respondent's failure to submit or complete a biological fluid test shall result in a violation of probation.
4612. **Diversion Program.** Adds that respondent shall execute a release authorizing the Diversion Program to notify the Division of specified determinations and to provide confirmation respondent shall cease the practice of medicine; if the Diversion Program determines that respondent requires further treatment and rehabilitation, the period of probation shall be extended; if the Diversion Program determines that respondent shall cease the practice of medicine, respondent shall not engage in the practice of medicine; and failure to cooperate or comply with the Diversion Program shall result in a violation of probation.
4713. **Community Service - Free Services.** Adds that respondent shall submit a plan to complete community service within a specified period; respondent shall provide a copy of the Decision(s) to the Chief of Staff, Director, Office Manager, Program Manager, Officer, or the Chief Executive Officer at every community or non-profit organization where respondent provides community services and provide proof of compliance to the Division; and community service performed prior to the effective date of the Decision will not be accepted.
4814. **Education Course.** Specifies that within 60 calendar days of the effective date of the Decision, respondent shall submit an educational program and the educational courses shall be limited to classroom, conference or seminar settings that are Category I certified Continuing Medical Education (CME).
4215. **Prescribing Practices Course.** Adds provisions that the Prescribing Practices Course must be completed during the first 6 months of probation. A Prescribing Practices Course taken after the acts that gave rise to the Accusation, but prior to the effective date of the Decision may be accepted. Respondent shall submit a certification of completion not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.
16. **Medical Record Keeping Course.** New. Adds provisions that the Medical Record Keeping Course must be completed during the first 6 months of probation. A Medical Record Keeping Course taken after the acts that gave rise to the Accusation, but prior

to the effective date of the Decision may be accepted. Respondent shall submit a certification of completion not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.

- 18a17. **Ethics Course.** Adds that an Ethics Course taken after the acts that gave rise to the Accusation, but prior to the effective date of the Decision may be accepted. Respondent shall submit a certification of completion not later than 15 calendar days after successfully completing the course, or not later than 15 calendar days after the effective date of the Decision, whichever is later.
18. **Professional Boundaries Program.** New. Adds provisions that within a specified period, respondent shall enroll in a professional boundaries program, at respondent's expense, equivalent to the Professional Boundaries Program at the University of California, San Diego School of Medicine ("Program"); specifies Program components; requires respondent to successfully complete the components; failure to participate in and complete successfully the Program shall result in a violation of probation; and adds two optional conditions.
19. **Clinical Training Program.** Specifies that within 60 calendar days from the effective date of this Decision, respondent shall enroll in a clinical training or educational program equivalent to the Physician Assessment and Clinical Education Program at the University of California, San Diego School of Medicine ("Program"). The Program shall consist of a comprehensive assessment and clinical education. Failure to participate in and complete successfully all of the Clinical Training Program is a violation of probation. Adds three optional conditions.
20. **Oral Clinical or Written Examination.** Adds that within 60 calendar days of the effective date of this Decision, respondent shall take and pass an oral and/or written examination, administered by the Probation Unit; the Division or its designee shall administer the oral and/or written examination; the oral examination shall be audio tape recorded; and specifies that respondent is allowed two attempts within the first 180 days of probation to pass an oral and/or written examination.
21. **Psychiatric Evaluation.** Adds that prior to the psychiatric evaluation the board certified psychiatrist shall consider any information provided by the Division or its designee and any other information and documents that the psychiatrist may deem pertinent; psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement; and failure to undergo and complete a psychiatric evaluation and psychological testing, or comply with the required additional conditions or restrictions shall result in a violation of probation.
22. **Psychotherapy.** Adds that respondent shall submit the name and qualifications of a board certified psychiatrist or a licensed psychologist with specified qualifications; the frequency of psychotherapy may be modified; prior to the commencement of psychotherapy, the psychotherapist shall consider any information provided by the Division or its designee and any other information and documents that the psychotherapist may deem pertinent; respondent shall cooperate in providing the psychotherapist any information and documents that the psychotherapist may deem pertinent; and failure to undergo and continue psychotherapy treatment, or comply with any required modification in the frequency of psychotherapy is a violation of probation.

23. **Medical Evaluation and Treatment.** Adds that the evaluating physician shall consider any information provided by the Division or its designee prior to respondent's evaluation; following the evaluation, the Division shall determine whether or not additional conditions or restrictions need to be placed on respondent to ensure respondent's ability to practice medicine safely; respondent shall be notified in writing of the required additional conditions or restrictions; respondent shall comply with the additional conditions and restrictions within 15 calendar days. Adds that if respondent is required to undergo medical treatment, respondent shall within a specified period submit to the Division for prior approval the name and qualifications of a treating physician of respondent's choice; upon approval of the treating physician, respondent shall within 15 calendar days undertake medical treatment and shall continue such treatment until further notice; the treating physician shall consider any information provided by the Division or its designee and any other information the treating physician may deem pertinent prior to the treating physician's evaluation; respondent shall have the treating physician submit written quarterly reports to the Division indicating whether or not the respondent is capable of practicing medicine safely; respondent shall provide the Division with any and all medical records pertaining to treatment that the Division deems necessary; and failure to undergo and continue medical treatment or comply with the required additional conditions or restrictions shall result in a violation of probation.
24. **Medical Treatment.** This section has been eliminated and incorporated with Model Condition Number 23 - Medical Evaluation and Treatment.
2524. **Monitoring - Practice/Billing.** Specifies that the respondent shall provide the name and qualifications of one or more licensed physicians and surgeons to act as a monitor(s) whose licenses are valid and in good standing, and who are preferably American Board of Medical Specialties (ABMS) certified; a monitor shall have no prior or current business or personal relationship with respondent or other relationship that could reasonably be expected to compromise the ability of the monitor to render fair and unbiased reports to the Division, and be in respondent's field of practice. The Division shall provide the monitor with copies of the Decision(s) and Accusation(s) and proposed monitoring plan; the monitor shall sign a written statement that the monitor has read the Decision(s) and Accusation(s) and fully understands the role of a practice monitor and agrees or disagrees with the proposed monitoring plan. Respondent shall provide the monitor access to respondent's patient records; if the monitor resigns or is no longer available, respondent shall submit within 5 calendar days the name and qualifications of a replacement monitor; if respondent fails to obtain approval of a replacement monitor within 60 days of the resignation or unavailability of the monitor, respondent shall be suspended from the practice of medicine until a replacement monitor is approved and prepared to assume immediate monitoring responsibility. Adds that in lieu of a monitor respondent may participate in a professional enhancement program as specified. Optional condition regarding the prohibition of solo practice was moved to condition 25.
25. **Solo Practice.** Formerly part of optional language in Monitoring condition, specified that respondent is prohibited from engaging in the solo practice of medicine.
26. **Third Party Presence-Chaperone.** Adds that the third party chaperone(s) shall initial and date each patient medical record at the time the chaperone's services are

provided, and read the Decision(s) and the Accusation(s). Adds that respondent shall maintain a specified log of all patients seen for whom a third party chaperone is required; keep this log in a separate file or ledger, in chronological order, and available for immediate inspection and copying on the premises by the Division; and failure to maintain a log of all patients seen for whom a third party chaperone is required, or to make the log available for immediate inspection and copying on the premises, is a violation of probation. Adds new option requiring respondent to provide written notification to respondent's patients that a third party chaperone shall be present during all consultation, examinations, or treatment; respondent shall maintain a copy of the notification in the patient's file, and the notification shall be available for immediate inspection and copying on the premises during business hours by the Division during the term of probation, and shall be retained for the entire term of probation.

27. **Prohibited Practice-Incompetence.** Adds that respondent shall provide an oral and written notification to respondent's patients that respondent does not practice, perform or treat a specified procedure on a specified patient population. Respondent shall maintain a specified log of the oral notification, and maintain the written notification in the patient's file; these shall be available for immediate inspection and copying on the premises during business hours by the Division, and shall be retained for the entire term of probation.
28. **Notification.** Formerly part of Standard Stay Order. Specifies that prior to engaging in the practice of medicine the respondent shall provide a true copy of the Decision(s) and Accusation(s) at any facility where respondent engages in the practice of medicine to include all physician and locum tenens registries or other similar agencies; respondent shall submit proof of compliance to the Division or its designee within 15 calendar days. Specifies this condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.
2829. **Supervision of Physician Assistants.** No change.
2930. **Obey All Laws.** No change.
3031. **Quarterly Reports Declaration.** Adds new provision that respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.
3132. **Probation Surveillance Program Unit Compliance.** Deleted surveillance program from title. Specifies respondent shall not engage in the practice of medicine in respondent's place of residence.
3233. **Interview with the Division or its Designee.** Adds that respondent shall be available in person for interviews either at respondent's place of business or at the Probation Unit office either with or without prior notice.
3334. **Tolling of Probation Residing or Practicing Out-of-State.** Specifies that if respondent leaves the State of California to reside or practice, respondent shall notify the Division prior to the date of departure or return. If respondent's periods of temporary or permanent residence or practice outside California total two years, respondent's license shall be automatically cancelled. Periods of temporary or permanent residence or practice outside California shall not relieve respondent of the

*responsibility to comply with specified terms and conditions. For those licenses disciplined pursuant to Business and Professions Code sections 141(a) and 2305, the two year period begins on the date probation is completed in that state.*

**35. Failure to Practice Medicine - California Resident.** *New, replaces old condition of Tolling of Probation. If respondent resides in California and stops practicing medicine for a total of two years, respondent's license shall be automatically cancelled; periods of non-practice shall not relieve respondent of the responsibility to comply with specified terms and conditions.*

**3436. Completion of Probation.** *Adds that respondent shall comply with all financial obligations not later than 120 calendar days prior to the completion of probation.*

**3537. Violation of Probation.** *Adds that failure to fully comply with any term or condition of probation is a violation of probation.*

**3638. Cost Recovery.** *Adds that respondent shall reimburse the Division for its prosecution costs.*

**3739. License Surrender.** *Adds that upon formal acceptance of the surrendered license, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Division and respondent shall no longer be able to practice medicine; the surrender of respondent's license shall be deemed disciplinary action; if respondent reapplies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.*

**3840. Probation Monitoring Costs.** *Technical changes only.*

#### Underlying Data

Manual of Disciplinary Guidelines and Disciplinary Order, 8<sup>th</sup> Edition, 1999

#### Business Impact

This regulation will not have a significant adverse economic impact on businesses.

#### Specific Technologies or Equipment

This regulation does not mandate the use of specific technologies or equipment.

#### Consideration of Alternatives

No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the board would be either more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed regulation. The board negotiated the language of the revisions to the "Manual of Model Disciplinary Orders and Disciplinary Guidelines" (9<sup>th</sup> Edition, 2003) with the California Medical Association and the Center for Public Interest Law.